

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

6 KEITH E. SCHRIVER, JR., )  
7 Plaintiff, ) No. CV-10-286-JPH  
8 v. )  
9 MICHAEL J. ASTRUE, Commissioner ) ORDER GRANTING PLAINTIFF'S  
10 of Social Security, ) MOTION FOR SUMMARY JUDGMENT  
11 Defendant. ) AND REVERSING AND REMANDING  
12 ) PURSUANT TO SENTENCE FOUR  
13 )  
14 )  
15 )

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on September 9, 2011 (ECF No. 14, 16). Attorney Maureen J. Rosette represents plaintiff. Special Assistant United States Attorney Matthew W. Pile represents the Commissioner of Social Security (Defendant). The parties consented to proceed before a magistrate judge (ECF No. 7). On July 20, 2011, plaintiff filed a reply (ECF No. 18). After reviewing the administrative record and the briefs filed by the parties, the court **grants** plaintiff's motion for summary judgment (ECF No. 14), **reverses and remands for further proceedings**, and **denies** defendant's motion for summary judgment (ECF No. 16).

## JURISDICTION

Plaintiff protectively filed concurrent applications for supplemental security income (SSI) and disability insurance

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1 benefits (DIB) on October 7, 2008, alleging onset as of July 15,  
 2 2006, due to right elbow, right knee, back, and left ankle pain;  
 3 constant headaches, dizzy spells, hearing problems, heart  
 4 palpitations, and blackouts (Tr. 129-135, 136-142, 151, 155, 199).  
 5 In January 2010 plaintiff alleged he suffered from depression (Tr.  
 6 323). The applications were denied initially and on  
 7 reconsideration (Tr. 73-76, 77-80). On February 26, 2010,  
 8 Administrative Law Judge (ALJ) R. J. Payne held a hearing.  
 9 Plaintiff, represented by counsel, and a medical expert testified  
 10 (Tr. 33-68).

11 On March 11, 2010, the ALJ issued an unfavorable decision  
 12 (Tr. 16-27). The Appeals Council denied review on August 6, 2010  
 13 (Tr. 1-3). Therefore, the ALJ's decision became the final decision  
 14 of the Commissioner, which is appealable to the district court  
 15 pursuant to 42 U.S.C. § 405(g). On August 27, 2010, plaintiff  
 16 filed this action for judicial review (ECF No. 1, 4).

#### 17 **STATEMENT OF FACTS**

18 As the parties are familiar with the facts, we will not  
 19 repeat them here.

20 Plaintiff was 47 years old when the ALJ filed his decision.  
 21 He graduated from high school and has worked as a vineyard  
 22 laborer, hotel houseman, and warehouse worker (Tr. 40-44, 160,  
 23 167).

24 Plaintiff testified his ankle hurts daily; once or twice a  
 25 month it is so painful he is unable to walk on it. He has  
 26 constant headaches, occasional back pain, and an elbow injury  
 27 prevents lifting (Tr. 47-48, 50). Plaintiff has had vision

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1 problems since childhood. He can only see with one eye at a time  
 2 and has no binocular vision. He suffers heart palpitations 5-6  
 3 times a month; about three times a month this causes him to  
 4 blackout (Tr. 51-53). Plaintiff has sleep problems. He can stand  
 5 one hour and walk two hours; he "nods off" after sitting for an  
 6 hour. He is able to carry and lift 10-15 pounds (Tr. 54-56, 61).

7 Plaintiff suffers depression and has suicidal thoughts every  
 8 few days. He lives alone with his dog in an isolated area without  
 9 running water, electricity, or indoor plumbing. The nearest water  
 10 source is a half-mile from his home. He sees another person once a  
 11 month (Tr. 53, 56-60, 63-64).

#### **SEQUENTIAL EVALUATION PROCESS**

13 The Social Security Act (the Act) defines disability  
 14 as the "inability to engage in any substantial gainful activity by  
 15 reason of any medically determinable physical or mental impairment  
 16 which can be expected to result in death or which has lasted or  
 17 can be expected to last for a continuous period of not less than  
 18 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act  
 19 also provides that a plaintiff shall be determined to be under a  
 20 disability only if any impairments are of such severity that a  
 21 plaintiff is not only unable to do previous work but cannot,  
 22 considering plaintiff's age, education and work experiences,  
 23 engage in any other substantial gainful work which exists in the  
 24 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,  
 25 the definition of disability consists of both medical and  
 26 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
 27 (9<sup>th</sup> Cir. 2001).

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1       The Commissioner has established a five-step sequential  
2 evaluation process for determining whether a person is disabled.  
3 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
4 is engaged in substantial gainful activities. If so, benefits are  
5 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
6 the decision maker proceeds to step two, which determines whether  
7 plaintiff has a medically severe impairment or combination of  
8 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

9       If plaintiff does not have a severe impairment or combination  
10 of impairments, the disability claim is denied. If the impairment  
11 is severe, the evaluation proceeds to the third step, which  
12 compares plaintiff's impairment with a number of listed  
13 impairments acknowledged by the Commissioner to be so severe as to  
14 preclude substantial gainful activity. 20 C.F.R. §§  
15 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
16 App. 1. If the impairment meets or equals one of the listed  
17 impairments, plaintiff is conclusively presumed to be disabled. If  
18 the impairment is not one conclusively presumed to be disabling,  
19 the evaluation proceeds to the fourth step, which determines  
20 whether the impairment prevents plaintiff from performing work  
21 which was performed in the past. If a plaintiff is able to perform  
22 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
23 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's  
24 residual functional capacity (RFC) assessment is considered. If  
25 plaintiff cannot perform this work, the fifth and final step in  
26 the process determines whether plaintiff is able to perform other  
27 work in the national economy in view of plaintiff's residual

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1 functional capacity, age, education and past work experience. 20  
 2 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,  
 3 482 U.S. 137 (1987).

4 The initial burden of proof rests upon plaintiff to establish  
 5 a *prima facie* case of entitlement to disability benefits.  
 6 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
 7 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
 8 met once plaintiff establishes that a physical or mental  
 9 impairment prevents the performance of previous work. The burden  
 10 then shifts, at step five, to the Commissioner to show that (1)  
 11 plaintiff can perform other substantial gainful activity and (2) a  
 12 "significant number of jobs exist in the national economy" which  
 13 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
 14 Cir. 1984).

#### 15 STANDARD OF REVIEW

16 Congress has provided a limited scope of judicial review of a  
 17 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
 18 the Commissioner's decision, made through an ALJ, when the  
 19 determination is not based on legal error and is supported by  
 20 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
 21 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
 22 "The [Commissioner's] determination that a plaintiff is not  
 23 disabled will be upheld if the findings of fact are supported by  
 24 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
 25 Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is  
 26 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
 27 1119 n.10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.

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1     *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
 2     *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
 3     573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
 4     evidence as a reasonable mind might accept as adequate to support  
 5     a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 6     (citations omitted). "[S]uch inferences and conclusions as the  
 7     [Commissioner] may reasonably draw from the evidence" will also be  
 8     upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
 9     review, the Court considers the record as a whole, not just the  
 10    evidence supporting the decision of the Commissioner. *Weetman v.*  
 11    *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
 12    *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

13       It is the role of the trier of fact, not this Court, to  
 14    resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
 15    evidence supports more than one rational interpretation, the Court  
 16    may not substitute its judgment for that of the Commissioner.  
 17    *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
 18    (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
 19    evidence will still be set aside if the proper legal standards  
 20    were not applied in weighing the evidence and making the decision.  
 21    *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432,  
 22    433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
 23    support the administrative findings, or if there is conflicting  
 24    evidence that will support a finding of either disability or  
 25    nondisability, the finding of the Commissioner is conclusive.  
 26    *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

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## **ALJ'S FINDINGS**

The ALJ found plaintiff was insured through December 31, 2009, for DIB purposes (Tr. 16, 18). At step one, he found plaintiff did not engage in substantial gainful activity after onset on July 15, 2006 (Tr. 18). At steps two and three, he found plaintiff suffers from heart problems including syncope of unknown etiology, hypertension, mild cardiomyopathy, morbid obesity, left ankle status post sprain, and right eye strabismus with bilateral exotropia,<sup>1</sup> impairments that are severe but do not meet or equal Listing-level severity (Tr. 18, 23). [At the hearing counsel also stipulated no Listings were met or equaled. See Tr. 65-66.] The ALJ found plaintiff less than fully credible (Tr. 24), a finding he does not challenge on appeal. At step four, ALJ Payne found plaintiff is unable to perform any past relevant work (Tr. 25). At step five, relying on the grids, he found plaintiff is not disabled as defined by the Social Security Act (Tr. 26-27).

## ISSUES

18 Plaintiff raises two issues. He alleges the ALJ should have  
19 credited the opinion of examining psychologist Dennis Pollack,  
20 Ph.D., and alleges the ALJ should have called a vocational expert  
21 to testify at step five instead of relying on the grids.<sup>2</sup>  
22 Plaintiff argues the presence of non-exertional limits required a

<sup>24</sup> "Strabismus" is an affection of the eyes in which the axes  
of vision cannot be coincidentally directed to the same object;  
<sup>25</sup> "exotropia" means the visual lines deviate outwards. Oxford  
Dictionaries. April 2010

<sup>2</sup>In this case the "grids" refers to Medical-Vocational Rule 202.21 at 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 202.21.

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1 vocational expert's testimony (ECF No. 15 at 6-10, and 15 at 10-  
 2 12).

3 Asserting the ALJ's decision is free of error and supported  
 4 by substantial evidence, the Commissioner asks the Court to affirm  
 5 (ECF No. 17 at 6-12, and 17 at 12-16).

6 While the second issue is dispositive, the Court discusses  
 7 both for purposes of remand.

#### 8 DISCUSSION

##### 9 **A. Weighing evidence - standards**

10 In social security proceedings, the claimant must prove the  
 11 existence of a physical or mental impairment by providing medical  
 12 evidence consisting of signs, symptoms, and laboratory findings;  
 13 the claimant's own statement of symptoms alone will not suffice.  
 14 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
 15 on the basis of a medically determinable impairment which can be  
 16 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
 17 medical evidence of an underlying impairment has been shown,  
 18 medical findings are not required to support the alleged severity  
 19 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991).

20 A treating physician's opinion is given special weight  
 21 because of familiarity with the claimant and the claimant's  
 22 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9<sup>th</sup> Cir.  
 23 1989). However, the treating physician's opinion is not  
 24 "necessarily conclusive as to either a physical condition or the  
 25 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
 26 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
 27 treating physician than an examining physician. *Lester v. Chater*,

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1 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
 2 given to the opinions of treating and examining physicians than to  
 3 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
 4 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
 5 are not contradicted, they can be rejected only with clear and  
 6 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
 7 ALJ may reject an opinion if he states specific, legitimate  
 8 reasons that are supported by substantial evidence. See *Flaten v.*  
 9 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
 10 1995).

11 In addition to the testimony of a nonexamining medical  
 12 advisor, the ALJ must have other evidence to support a decision to  
 13 reject the opinion of a treating physician, such as laboratory  
 14 test results, contrary reports from examining physicians, and  
 15 testimony from the claimant that was inconsistent with the  
 16 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
 17 751-752 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-1043 (9<sup>th</sup>  
 18 Cir. 1995).

19 **C. Grids at Step five**

20 Citing *Polny v. Bowen*, 864 F.2d 661 (9<sup>th</sup> Cir. 1988), plaintiff  
 21 asserts the ALJ should have relied on a vocational expert rather  
 22 than the grids at step five (ECF No. 15 at 10-12). The  
 23 Commissioner asserts *Polny* is distinguishable because the claimant  
 24 in that case suffered significant mental limitations, as opposed  
 25 to Mr. Schriver's "comparatively minor postural and vision  
 26 limitations." The Commissioner asserts because plaintiff's non-

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exertional limitations<sup>3</sup> would have very little affect on the occupational base for unskilled light work, the ALJ properly relied on the grids (ECF No. 17 at 12-15).

The ALJ assessed an RFC for unskilled light work with additional limitations: plaintiff can occasionally (1) climb ramps or stairs; and (2) stoop, kneel, crouch, crawl, or balance; but is (3) precluded from climbing ladders, ropes or scaffolds, and (4) cannot do work "requiring good binocular vision or depth perception" (Tr. 23).

10 The ALJ found:

11 " . . . the additional limitations have little or no  
12 effect on the occupational base of unskilled light work.  
13 A finding of 'not disabled' is therefore appropriate under  
the framework of this rule. Indeed, the claimant has worked  
at substantial gainful activity levels with his reported  
impairments and limitations."

14 (Tr. 26).

15 It is the Commissioner's burden at step five to show there  
16 are other jobs a claimant can perform. In support of using the  
17 grids at step five, the ALJ cites Social Security Rulings (SSRs)  
18 83-11, 83-12, 83-14 and 85-15.

Social Security Rulings do not have the force of law. *Paxton v. Secretary of Health and Human Servs.*, 856 F.2d 1352, 1356 (9<sup>th</sup> Cir. 1998). Nevertheless, they constitute Social Security Administration interpretations of the statute it administers and of its own regulations. Accordingly, we defer to Social Security

<sup>3</sup>Nonexertional limitation means any limitation other than the strength requirements, which consist of work positions (standing, walking and sitting) and worker movement of objects (lifting, carrying, pushing, and pulling). SSR 83-14 at page 1.

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1 Rulings unless they are plainly erroneous or inconsistent with the  
2 Act or regulations. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457  
3 (9<sup>th</sup> Cir. 1989), citing *Paxton*, 856 F.2d at 1356 (additional  
4 citations omitted). As discussed below, the applicable rulings are  
5 consistent with the Social Security Act.

6 Plaintiff reads *Polny* too broadly. An ALJ cannot apply the  
7 grids where a claimant's nonexertional limitations are in  
8 themselves enough to limit his range of work. *Polny v. Bowen*, 864  
9 F.2d 661, 664 (9<sup>th</sup> Cir. 1988); *Burkhart v. Bowen*, 856 F.2d 1335,  
10 1340 (9<sup>th</sup> Cir. 1988). An allegation of nonexertional limitations  
11 "does not automatically preclude application of the grids."  
12 *Desrosiers v. Secretary of Health & Human Servs.*, 846 F.2d 573,  
13 577 (9<sup>th</sup> Cir. 1988).

14 The ALJ should "first determine if a claimant's non-  
15 exertional limitations significantly limit the range of work  
16 permitted by his exertional limitations." *Desrosiers*, 846 F.2d at  
17 577.

18 Here, the ALJ cited the SSRs and found plaintiff's additional  
19 impairments have little or no effect on the occupational base of  
20 unskilled light work (Tr. 26).

21 The Commissioner attempts to provide reasons for the ALJ's  
22 conclusion, but the Court is constrained to review the reasons the  
23 ALJ asserts. *Connett v. Barnhart*, 340 F.3d 871, 874 (9<sup>th</sup> Cir.  
24 2003)(citations omitted).

25 After reviewing the rulings cited by the ALJ, the Court  
26 concludes the evidence does not sufficiently support his step five  
27 determination.

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1 Plaintiff's assessed RFC permits occasionally climbing  
 2 stairs, and occasionally balancing, up to a third of the day. The  
 3 ALJ found plaintiff cannot perform work requiring good binocular  
 4 vision or depth perception (Tr. 23, purporting to rely on the  
 5 medical expert's testimony at Tr. 38-39<sup>4</sup>). The requirement of good  
 6 binocular vision is not supported by the evidence. Dr. Beezy  
 7 testified plaintiff could do no work requiring binocular vision or  
 8 depth perception (Tr. 38)(emphasis added).

9 SSR 83-14 (cited by the ALJ at Tr. 26) indicates most  
 10 unskilled light jobs require a person to be standing or walking  
 11 most of the day. The ruling also provides

12 Where a person has a visual impairment which is not of  
 13 Listing severity but causes the person to be a hazard to  
 14 self and others -- usually a constriction of visual fields  
 15 rather than a loss of acuity -- the manifestations of ...  
*difficulty in walking up and down stairs ... will indicate*  
*to the decisionmaker that the remaining occupational base*  
*is significantly diminished for light work.*

16 SSR 83-14 at 4 (emphasis added).

17 SSR 85-15, also cited by the ALJ, provides:

18 *Limitations in climbing and balancing can have varying*  
 19 *effects on the occupational base, depending on the*  
 20 *degree of limitation and the type of job. Usual everyday*  
 21 *activities, both at home and at work, include ascending*  
 22 *or descending ramps or a few stairs and maintaining*  
 23 *body equilibrium while doing so ... Where a person has*  
 24 *some limitation in climbing and balancing and it is*  
*the only limitation, it would not ordinarily have a*  
*significant impact on the broad world of work ...*  
*Where the effects of a person's actual limitations*  
*on climbing and balancing on the occupational base*  
*are difficult to determine, the services of a VS may*  
*be necessary.*

25 SSR 85-15 at 6 (emphasis added).

26 Where the extent of erosion of the occupational base is not

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27                   <sup>4</sup>Reuben Beezy, M.D., testified at the hearing (Tr. 34-39).  
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1 clear, the adjudicator will need to consult a vocational resource.  
 2 SSR 83-12 at 2.

3 The Commissioner bears the burden of proof at step five.  
 4 *Burch v. Barnhart*, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005)(citation  
 5 omitted). As in *Shahabzada v. Astrue*, 2010 WL 653580 (S.D.Cal.),  
 6 the ALJ's conclusion that Mr. Schriver's limitations do not  
 7 significantly reduce the occupational base is entirely  
 8 unsupported. It is conclusory and lacks meaningful analysis.  
 9 Although it may, ultimately, turn out to be correct, it is not  
 10 supported by "such relevant evidence as a reasonable mind might  
 11 accept as adequate to support [its] conclusion." *Id.* at 3, citing  
 12 *Webb v. Barnhart*, 433 F.3d 683, 686 (9<sup>th</sup> Cir. 2005).

13 In the Court's view plaintiff's true assessed visual  
 14 limitations combined with additional nonexertional limitations may  
 15 significantly diminish plaintiff's occupational base. On remand a  
 16 vocational expert's testimony is necessary to clarify the combined  
 17 effects of plaintiff's assessed limitations. At step five the ALJ  
 18 observes plaintiff has been able to work at SGA levels. Presumably  
 19 the ALJ refers to plaintiff's abilities before onset in 2006,  
 20 since at step one he found plaintiff did not engage in SGA after  
 21 onset (*cf.* Tr. 18 with Tr. 26). This reason is not persuasive  
 22 because it does not address plaintiff's limitations during the  
 23 relevant time frame.

24 A vocational expert's testimony is necessary to clarify the  
 25 effects of plaintiff's combined limitations on the occupational  
 26 base.

27 The Court wishes to make clear it expresses no opinion as to

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1 what the ultimate outcome on remand will or should be. The  
 2 Commissioner is free to give whatever weight to the additional  
 3 evidence he or she deems appropriate. *Sample v. Schweiker*, 694  
 4 F.2d 639, 642 (9<sup>th</sup> Cir. 1982) ("[Q]uestions of credibility and  
 5 resolution of conflicts in the testimony are functions solely of  
 6 the Secretary").

7 **B. Dr. Pollack's opinion**

8 Plaintiff alleges the ALJ should have adopted the marked and  
 9 moderate mental limitations<sup>5</sup> assessed by examining psychologist  
 10 Dr. Pollack.<sup>6</sup> According to the Commissioner, the ALJ gave specific  
 11 and legitimate reasons for rejecting Pollack's contradicted  
 12 opinion. The parties agree this is the correct standard, as does  
 13 the Court.

14 Dr. Pollack evaluated plaintiff on February 15, 2010, more  
 15 than four years after onset. The ALJ gave it "absolutely no  
 16 weight" because there are no treatment notes, application alleged  
 17 disability based solely on physical limitations, and the  
 18 evaluation was requested by plaintiff's counsel (Tr. 21-23,  
 19 referring to Tr. 322-332). At the hearing plaintiff indicated he  
 20 just wanted to address "the physical," presumably rather than the  
 21 mental, limitations (Tr. 37).

22 The ALJ is correct. Plaintiff has had no mental health  
 23 treatment. No other professional has noted signs of mental

24  
 25 <sup>5</sup>see Tr. 330.

26 <sup>6</sup>Dr. Pollack diagnosed depressive disorder NOS, pain  
 27 disorder associated with both psychological factors and  
 28 general medical condition, and personality disorder with  
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1 impairment. In July 2006, ten days before onset, examining  
 2 cardiologist William Stifter, M.D., notes "no depression, anxiety  
 3 or agitation" (Tr. 262). Results of the MMPI-2 given by Pollack  
 4 show plaintiff exaggerated. The applications for benefits did not  
 5 allege mental impairment (Tr. 22-23, 322).

6 To aid in weighing the conflicting medical evidence, the ALJ  
 7 evaluated plaintiff's credibility and found him less than fully  
 8 credible (Tr. 24). Credibility determinations bear on evaluations  
 9 of medical evidence when an ALJ is presented with conflicting  
 10 medical opinions or inconsistency between a claimant's subjective  
 11 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d  
 12 683, 688 (9<sup>th</sup> Cir. 2005).

13 The ALJ gave clear and convincing reasons for his  
 14 unchallenged credibility assessment, including (1) inconsistent  
 15 statements; (2) activities inconsistent with claimed disabling  
 16 limitations, and (3) a lack of supporting medical evidence for  
 17 complaints of disabling limitations (Tr. 24).

18 Plaintiff has inconsistently reported his use of drugs,  
 19 alcohol, and tobacco. In January 2005, he told PAC Ed Hendrickson  
 20 he uses THC occasionally (Tr. 280). In 2010 he told Dr. Pollack he  
 21 has been drug free since 1998 (Tr. 324). Because a claimant's  
 22 inconsistent statements diminish credibility, it is a factor the  
 23 ALJ may properly consider. *Thomas v. Barnhart*, 278 F.3d 947, 958-  
 24 959 (9<sup>th</sup> Cir. 2002).

25 Examining doctor Robert Bray, M.D., found in January 2009  
 26 plaintiff's sole limitation was lifting (Tr. 296). Plaintiff walks  
 27 a half mile to get water and then carries it home. He chops wood

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1 for heat (Tr. 24-25; 182; 184). If a claimant is able to spend a  
2 substantial part of his day engaged in pursuits involving the  
3 performance of physical functions that are transferable to a work  
4 setting, a specific finding as to this fact may be sufficient to  
5 discredit a claimant's allegations. See *Morgan v. Apfel*, 169 F.3d  
6 595, 600 (9<sup>th</sup> Cir. 1999)(citation omitted).

7 Significantly, there are no records of mental health  
8 treatment. Plaintiff told Dr. Pollack he suffers from depression  
9 but had never undergone a psychiatric or psychological evaluation  
10 (Tr. 324).

11 The record supports the ALJ's unchallenged credibility  
12 finding, and further supports the ALJ's rejection of Dr. Pollack's  
13 opinion. An ALJ may discount an examining professional's  
14 contradicted opinion by giving specific and legitimate reasons  
15 supported by substantial evidence. See *Lester v. Chater*, 81 F.3d  
16 821, 830 (9<sup>th</sup> Cir. 1995).

17 ALJ Payne discounted the examining psychologist's  
18 contradicted opinion for specific, legitimate reasons: a complete  
19 lack of treatment, contradictory opinions by other professionals,  
20 tests showing exaggeration, and failing to allege mental  
21 limitations until years after onset (Tr. 22-23). These reasons are  
22 supported by substantial evidence. There was no error. See  
23 *Andrews*, 53 F.3d at 1042-1043; *Magallanes*, 881 F.2d at 751-752.

24 The ALJ is responsible for reviewing the evidence and  
25 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
26 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
27 trier of fact, not this court, to resolve conflicts in evidence.

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1 *Richardson*, 402 U.S. at 400. The court has a limited role in  
2 determining whether the ALJ's decision is supported by substantial  
3 evidence and may not substitute its own judgment for that of the  
4 ALJ, even if it might justifiably have reached a different result  
5 upon de novo review. 42 U.S.C. § 405 (g).

6 The ALJ's reasons for rejecting Dr. Pollack's opinion are  
7 free of error and supported by substantial evidence.

8 **CONCLUSION**

9 Having reviewed the record and the ALJ's conclusions, this  
10 court finds that the ALJ's decision is not supported by  
11 substantial evidence and contains legal error.

12 **IT IS ORDERED:**

13 1. Plaintiff's motion for summary judgment (**Ct. Rec. 14**) is  
14 granted. The case is reversed and remanded pursuant to sentence  
15 four for further administrative proceedings, specifically, a new  
16 step five determination.

17 2. Defendant's motion for summary judgment (**Ct. Rec. 16**) is  
18 denied.

19 The District Court Executive is directed to file this Order,  
20 provide copies to counsel for the parties, enter judgment in favor  
21 of Plaintiff, and **CLOSE** this file.

22 DATED this 12th day of September, 2011.

23

24 s/ James P. Hutton

25 JAMES P. HUTTON  
26 UNITED STATES MAGISTRATE JUDGE

27

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